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HIGH COURT OF CHHATTISGARH AT BILASPUR

Criminal Appeal No.564 of 2005

Appellants: Bhaiyalal & others
(In Jail)

Versus

Respondent: State of Chhattisgarh

POST FOR JUDGMENT ON 24/9/2007

Sd/-
DHIRENDRA MISHRA
Judge

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HIGH COURT OF CHHATTISGARH AT BILASPUR

Criminal Appeal No.564 of 2005

Appellants: (In Jail)

1. Bhaiyalal, S/o Sonsai Rajwade, aged about 35 years, Occupation-Agriculture (Accuse No.7)
2. Tejbhaj Singh, S/o Brijlal, aged about 20 years, Occupation-Agriculture (Accuse No.9)
3. Ramshankar, S/o Sukhendas, aged about 25 years, Occupation-Agriculture (Accuse No.10)

All are resident of Village Indarpur, Thana Khadgawan, Distt. Korea (C.G.)

Versus

Respondent: State of Chhattisgarh

Present:

Mr. Mahendra Dubey, Advocate — For the appellants

Mr. Neeraj Mehta, Panel Lawyer — For the respondent

J U D G M E N T

(Delivered on 24.9.2007)

Per Dhirendra Mishra, J

1. This appeal is directed against the judgment dated 7th May, 2005 passed by learned Additional Sessions Judge, Baikunthpur, District Koriya in Sessions Trial No.243/04 whereby learned Additional Sessions Judge has convicted the appellants under Sections 457 & 394 of the Indian Penal Code (for short 'IPC') and sentenced each of the appellants to undergo R.I. for 5 years and to pay a fine of Rs.500/-, in default of payment of fine to further undergo R.I. for 3 months & R.I. for 10 years and to pay a fine of Rs.1,000/-, in

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default of payment of fine to further undergo R.I. for 6 months respectively. Both the substantive sentences were directed to run concurrently.

2. Case of the prosecution, in brief, is that complainant Shyam Bihari @ Makhan Singh (PW-11) resides with his family in village Narsinghpur. On 3.10.2003 around 2.00 in the night when he and his family members were sleeping in the house, four unknown persons entered his house, they first assaulted the complainant and his family members by club and thereafter demanded key of the almirah. As the key of almirah was already present in the keyhole, therefore, they started searching almirah. They took out the articles from the almirah and thereafter locked the family members in a room and fled away. On verification they discovered that one golden necklace, two rings, earrings, 7 pairs of silver anklet, cash etc. valued at Rs.24,800/- was missing. The accused persons further threatened that they shall be returning on 12.10.2003 and the complainant should keep ready Rs.1,50,000/- Three of them had covered their faces and fourth was wearing cap and their age was around 18-19 years.

3. Report of the incident was lodged at 6.00 a.m. in the Police Station Baikunthpur vide Ex.P-27 and the complainant and his family members were medically examined. Injury report of Vishal Singh, Smt. Premkumari, Aarti Singh, Jyoti Singh & Shyam Bihari Singh is Ex.P-22, P-23, P-24, P-25 & P-26 respectively. Three months after the incident the accused persons were arrested. Accused Bhaiyalal, Tejbhan Singh & Ramashankar were arrested on 17.1.2004, 22.1.2004 & 17.3.2004 respectively. On the basis of memorandum of Ex.P-13 two golden earrings, one pair of silver anklet, cash of Rs.300/- and other articles of loot were seized vide seizure memo of Ex.P-14. On the memorandum (Ex.P-17A) of appellant Ramashankar recorded on 18.3.2004 one

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ladies wrist watch was seized vide seizure memo of Ex.P-18. Similarly, on the memorandum of accused Tejbhan Singh dated 18.3.2004 one pair of silver anklet was seized vide Ex.P-20. Test identification parade (Ex.P-17) was conducted by the Executive Magistrate Shri J.R. Rathiya (PW-8) on 1.4.2004 in District Jail, Baikunthpur where Vishal Singh identified the appellant Ramashankar apart from other accused persons, whereas, Shyam Bihari @ Makhan Singh identified the appellant Bhaiyalal apart from two other accused persons.

4. After completing investigation, charge sheet was filed against 10 accused persons including the present appellants in the Court of learned Chief Judicial Magistrate, Baikunthpur and after committal, the case was received on transfer for trial by the learned Additional Sessions Judge. During trial 18 witnesses were examined by the prosecution and thereafter, statement of the accused persons was recorded under Section 313 of the Code of Criminal Procedure (for short 'Cr.P.C.') in which the appellants pleaded innocence and false implication.

5. Learned Additional Sessions Judge after hearing learned counsel for the respective parties, convicted and sentenced the appellants, as mentioned in Para 1 of this judgment. However, seven other accused persons were acquitted of all the charges.

6. Conviction of appellant Bhaiyalal (accused No.7) is based on his identification in the court by the complainant Shyam Bihari @ Makhan Singh as also other family members. Looted articles i.e. golden earrings, bangles etc. have also been recovered at the instance of appellant Bhaiyalal. Similarly, appellant Tejbhan Singh (accused No.9) has been convicted on the basis of recovery of silver anklet and appellant Ramashankar (accused No.10) has been convicted on

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the basis of recovery of one ladies watch, which were looted from the house of the complainant.

7. Learned counsel for the appellants submitted that incident is of 3.10.2003, whereas, test identification parade was conducted after six months of the incident i.e. on 1.4.2004 and from the evidence available on record it is evident that it was dark in the house and lights were put-off and they could not see the glimpse of accused persons in the light of torch flashed by the accused persons themselves and this has also not been stated by the witnesses in their diary statement. Therefore, conviction of appellant Bhaiyalal on the ground that he was identified in the court by the complainant Shyam Bihari @ Makhan Singh (PW-11) as also by other family members cannot be sustained. It is further argued that the complainant as also his son Vishal (PW-10) and wife Premkumari (PW-12) have identified accused No.4 Baba @ Devsaran & accused No.8 Aagarsai @ Jansai, however they have been disbelieved by the trial in this regard. Relying upon judgment of the Division Bench of this Court in the mater of **Randhir & ors Versus State of M.P.**[1] it is argued that where the offence is committed in the dark night and the features of culprit is not mentioned in the FIR, identification of the accused in the court based on flashing of torch light is improbable. It was further argued that witnesses of memorandum of accused persons and seizure of looted articles on the basis of memorandums have not supported the case of the prosecution and they have turned hostile. Looted articles were not put for identification during investigation and the court below only on the basis of identification of said articles during trial almost after more than 10 months of the incident, convicted the appellants, which is illegal and cannot be sustained.

[1] 2006 (1) Crimes 719

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Reliance is also placed on the judgment in the matter of **Kansraj (In Jail) Vs. Stat of U.P.**[2]

8. On the other hand learned counsel for the State supporting the impugned judgment submitted that five members of a family sustained injuries in the incident. In the FIR also it is mentioned that face of one of the culprits was not covered and all the witnesses have correctly identified the appellant Bhaiyalal as the person who had entered their house and committed loot along with other three accused persons. Appellant Bhaiyalal has also been identified by the complaint vide Ex.P-17. Apart from this, the witnesses have identified the looted articles, which were produced during trial, as articles belonging to them and the accused persons have not offered any explanation as to how they came into the possession of these articles, which were belonging to the complainant and in these circumstances the conviction of the appellants by the trial court is based on the reliable evidence available on the record and the same does not call for interference.

9. I have heard learned counsel for the parties and perused the record as also the impugned judgment.

10. Conviction of appellant Bhaiyalal is based on the statement of Shyam Bihari @ Makhan Singh (PW-11), who has identified him in the test identification parade conducted on 1.4.2004 by Shri R.L. Rathiya, Executive Magistrate (PW-8) in District Jail, Baikunthpur. He has also been identified by the complainant and his family members during trial. Incident is of 2.00 a.m. in the night of 3.10.2003, appellant Bhaiyalal was arrested on 17.1.2004, test identification parade was conducted on 1.4.2004 in the District Jail, where he was allegedly identified by the complainant.

[2] 2002 Cri. L.J. 2216

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11. The complainant (PW-11) has stated in his evidence that the police conducted test identification parade in the police station vide Ex.P-17 and he identified three persons. In Para 17 of cross-examination this witness has admitted that appellant Bhaiyalal is resident of Village Kerabahra and in Para 2, pointing towards accused Bhaiyalal, he has stated that he was the person who demanded Rs.1,50,000/-. From the statement of this witness, particularly, Para 7 of his deposition it appears that he recognizes appellant Bhaiyalal since before, as he his resident of neighbouring village Kerabahra, and he claims that he disclosed this fact to the police. However, in the FIR of Ex.P-27 only this much has been mentioned that one of the accused persons was wearing cap, he was of fair complexion, his age was 18-19 years and he shall identify him. But this fact is missing that he is the resident of Village Kerabahra or that the complainant recognizes him. Moreover, in the memo of arrest the age of appellant Bhaiyalal is mentioned as 34 years.

12. Conviction of appellant Bhaiyalal is also based on the recovery of looted articles on his memorandum, which has been duly identified by the complainant as also by other family members. Similarly, conviction of appellants Tejbhan Singh & Ramashankar is based on the recovery of looted articles being silver anklet and ladies watch on their memorandums and which have been identified by the complainant, his wife and other prosecution witnesses as the looted articles belonging to them and these accused persons have not given any explanation in their statement recorded under Section 313 of Cr.P.C. as to how they came into possession of these articles.

13. In the matter of Randhir & others[1] it has been held that where the incident took place in the dark night and the accused persons were not known to the victims of crime and the identification features of the

culprits are not mentioned in the FIR as also in the diary statement before the police, conviction of the appellants cannot be based on the test identification parade, which was conducted belatedly after the arrest of the accused persons. In the matter of Kansa @ Kansaram[2] it has been held that identification parade was held after a month of arrest of the accused, no evidence that every precaution was taken to conceal his identity from witnesses while he was brought to Court for taking remand and no special identifying features of accused were noticed by eye-witnesses. Therefore, no implicit reliance can be placed on the identification made at test identification parade.

14. In the light of principles of law laid down in the above cited judgments and considering the overall circumstances that admittedly lights were off at the time of incident, statement of witnesses was recorded after ten months, test identification parade was conducted after five months, appellant Bhaiyalal was arrested after two months from the date of incident and omission of fact that the complainant recognizes appellant Bhaiyalal since before, as he is resident of neighboring village Kerabahar, the identification of appellant Bhaiyalal during trial appears to be doubtful. The trial court has already disbelieved these witnesses with respect to the identification of other accused persons namely Baba @ Devsharan & Aagarsai @ Jansai and therefore, implicit reliance placed by the trial court in identification by complainant Shyam Bihari @ Makhan Singh (PW-11) was not proper.

15. Now coming to the question of recovery of looted articles at the instance of accused persons. Conviction of appellant Bhaiyalal is also based on the recovery of looted articles on the basis of his memorandum of Ex.P-13 vide seizure memo of Ex.P-14. Similarly, conviction of appellant Ramanshankar is based on recovery of ladies watch vide Ex.P-18 on his

memorandum of Ex.P-17A and Tejbhan Singh is based on the recovery of one pair of silver anklet vide Ex.P-20 on the basis of memorandum of Ex.P-19.

16. Uttam Shankar Sahu & Arun Kumar are the witnesses of memorandum and seizure of appellant Bhaiyalal. Uttam Shankar Sahu has been examined as PW-6 and he has stated that he has signed the memorandum of Ex.P-13 and seizure of Ex.P-14. Appellant Bhaiyalal made disclosure statement before him and on the basis of his disclosure statement, articles were seized in the police station. In the cross-examination he has admitted that he signed all the papers in the police station and he did not go to the village Indarpur. Other witness Arun Kumar has not been examined.

17. Rampyare (PW-14) & Mahmood (PW-17) are the witnesses of memorandums of accused Ramashankar & Tejbhan Singh and recovery of looted articles silver anklet and ladies wrist watch on the basis of their memorandums. Both these witnesses have turned hostile and in their cross-examination also the prosecution has not been able to elicit anything which supports the prosecution.

18. Shri I. Tirkey (PW-18), Sub-Inspector has proved the recovery of looted articles on the basis of memorandum of appellant Bhaiyalal vide Ex.P-14. In the cross-examination he has stated that interrogation of Bhaiyalal was done in the village Indarpur, whereas, Uttam Shankar Sahu (PW-6) has deposed that memorandum was recorded in the police station and he never went to Village Indarpur and he is resident of Village Kerabahra.

19. Therefore, in the considered opinion of this Court since the identification of appellant Bhaiyalal has been disbelieved, his conviction on the basis of recovery of looted articles on the basis of memorandum cannot be sustained. Even otherwise after recovering the articles

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the police did not conduct any test identification of the looted articles during investigation and the same were identified for the first time during trial and therefore, the conviction of appellant Bhaiyalal solely on the basis of recovery of looted articles on his memorandum cannot be sustained.

20. So far as the conviction of appellants Tejbhan Singh & Ramashankar is concerned, the same is based on the recovery of silver anklet and wrist watch on their memorandums under Section 27 of the Evidence Act. However, independent witnesses have not supported the recovery on memorandum statement of the appellants and they have categorically stated that memorandums of the above appellants were not recorded in their presence and nothing was recovered before them. Even articles were not put to identification during investigation and no test identification was conducted and these articles were identified for the first time by the prosecution witnesses during trial and therefore, this court is of the considered opinion that simply on the basis of above evidence the appellants Tejbhan Singh & Ramashankar could not have been convicted. The prosecution has failed to prove the offence against the appellants beyond reasonable doubt.

21. On the basis of aforesaid analysis, the appeal preferred by the appellants namely Bhaiyalal, Tejbhan Singh & Ramashankar is allowed, the impugned judgment of conviction of the appellants under Sections 457 & 394 of the IPC and sentences imposed on them under those sections are hereby set aside. The appellants are acquitted of all the charges. They be set at liberty forthwith, if not required in any other case.

Sd/-
DHIRENDRA MISHRA
Judge

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